

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ADAM GOMEZ,

Plaintiff,

v.

METRO AIR SERVICE INC., et al.,

Defendants.

Case No. 2:22-cv-04979-SP

MEMORANDUM OPINION AND  
ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND

**I.**

**INTRODUCTION**

On August 19, 2022, plaintiff Adam Gomez filed a motion to remand this case to the Superior Court of California, County of Los Angeles. Docket no. 24. Plaintiff's motion is supported by the declaration of plaintiff's counsel Piya Mukherjee and exhibit thereto. Defendant Metro Air Service, Inc. filed its opposition to the motion on September 6, 2022. Docket no. 26. Defendant's opposition is supported by the declaration of its payroll manager Ashley Brice ("9/6/22 Brice Decl."). On September 13, 2022, plaintiff filed his reply. Docket no. 27.

1 The matter came before the court for a hearing on September 27, 2022.  
2 After carefully considering the information provided and arguments advanced and  
3 the record before it, the court now grants plaintiff's motion to remand for the  
4 reasons discussed below.

## 5 II.

### 6 FACTUAL AND PROCEDURAL BACKGROUND

7 Plaintiff filed the instant putative class action in the Los Angeles County  
8 Superior Court on May 5, 2022, on behalf of himself and those individuals who  
9 were employed by defendant in California at any time from four years prior to the  
10 Complaint's filing and classified as non-exempt. *See* docket no. 1, Compl.  
11 Plaintiff alleges he and other employees were not compensated with all their wages  
12 lawfully due in that, inter alia, they were from time to time: unable to take their  
13 meal and rest breaks or required to work while clocked out during their breaks; not  
14 provided complete and accurate wage statements; and not timely paid their correct  
15 wages. Plaintiff asserts nine causes of action under California's Business and  
16 Professions Code and Labor Code: (1) unfair competition; (2) failure to pay  
17 minimum wages; (3) failure to pay overtime wages; (3) failure to provide required  
18 meal periods; (5) failure to provide required rest periods; (6) failure to provide  
19 accurate itemized statements; (7) failure to reimburse employees for required  
20 expenses; (8) failure to provide wages when due; and (9) failure to pay sick pay  
21 wages. Plaintiff alleges the aggregate amount in controversy is less than \$5  
22 million.

23 On July 20, 2022, defendant removed the action to this court under the Class  
24 Action Fairness Act ("CAFA"), 28 U.S.C. 1332(d). *See* docket no. 1, Notice of  
25 Removal ("NOR"). Defendant's Notice of Removal was supported by, inter alia,  
26 an earlier declaration of payroll manager Ashley Brice ("7/20/22 Brice Decl.").  
27 Defendant contends the aggregate amount in controversy exceeds \$5 million, there  
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1 are more than 100 proposed class members, and there is diversity of citizenship.

### 2 **III.**

### 3 **DISCUSSION**

4 Plaintiff argues removal was improper because defendant has failed to prove  
5 by a preponderance of the evidence that the amount in controversy exceeds \$5  
6 million. Mtn. at 3-10. Based on allegations in the Complaint and the declaration  
7 of Ashley Brice and exhibits, defendant contends the amount in controversy  
8 conservatively reaches \$10,696,664.50. Opp. at 11.

9 Any civil action over which the United States district courts have original  
10 jurisdiction may be removed to the district court for the district where such action  
11 is pending. 28 U.S.C. § 1441(a). A defendant seeking to remove a case to federal  
12 court must file a notice of removal containing a “short and plain statement of the  
13 grounds for removal.” 28 U.S.C. § 1446(a). But “[i]f at any time before final  
14 judgment it appears that the district court lacks subject matter jurisdiction, the case  
15 shall be remanded.” 28 U.S.C. § 1447(c).

16 The Class Action Fairness Act gives federal district courts original  
17 jurisdiction over any class action in which (1) the aggregate amount in controversy  
18 exceeds \$5 million, exclusive of interest and costs, (2) any member of a class of  
19 plaintiffs is diverse in citizenship from any defendant, and (3) the number of  
20 members of all proposed plaintiff classes exceeds 100 in the aggregate. 28 U.S.C.  
21 §§ 1332(d)(2), 1332(d)(5)(B); *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1195  
22 (9th Cir. 2015). A notice of removal based on CAFA jurisdiction must include “a  
23 plausible allegation that the amount in controversy exceeds the jurisdictional  
24 threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89,  
25 135 S. Ct. 547, 190 L. Ed. 2d 495 (2014). “[N]o antiremoval presumption attends  
26 cases invoking CAFA, which Congress enacted to facilitate adjudication of certain  
27 class actions in federal court.” *Id.* (citations omitted).

1 “[W]hen a defendant’s assertion of the amount in controversy is challenged  
2 . . . both sides submit proof and the court decides, by a preponderance of the  
3 evidence, whether the amount-in-controversy requirement has been satisfied.” *Id.*  
4 at 88. But although both sides “may submit evidence supporting the amount in  
5 controversy,” it is the defendant that has “the burden of supporting its  
6 ‘jurisdictional allegations with competent proof.’” *Harris v. KM Indus., Inc.*, 980  
7 F.3d 694, 699, 701 (9th Cir. 2020) (citation omitted). The plaintiff “need only  
8 challenge the truth of the defendant’s jurisdictional allegations by making a  
9 reasoned argument as to why any assumptions on which they are based are not  
10 supported by evidence.” *Id.* at 700 (citations omitted); *accord Waltz v. Wal-Mart*  
11 *Assocs., Inc.*, 2022 WL 489697, at \*2 (C.D. Cal. Feb. 17, 2022) (the plaintiff  
12 “bears no burden, here, to introduce any evidence”).

13 In determining the amount in controversy, the court considers the facts  
14 alleged in the complaint and “summary-judgment-type evidence relevant to the  
15 amount in controversy at the time of removal.” *Fritsch v. Swift Trans. Co. of Ariz.,*  
16 *LLC*, 899 F.3d 785, 793 (9th Cir. 2018). “[A] damages assessment may require a  
17 chain of reasoning that includes assumptions. When that is so, those assumptions  
18 cannot be pulled from thin air but need some reasonable ground underlying them.”  
19 *Ibarra*, 775 F.3d at 1199.

20 Here, plaintiff’s Complaint alleges a putative class of “all individuals who  
21 are or previously were employed by defendant in California, including any  
22 employees staffed with defendant by a third party, and classified as nonexempt  
23 employees [] at any time during the period beginning four (4) years prior to the  
24 filing of this Complaint and ending on the date as determined by the Court[.]”  
25 Compl. ¶ 4. In support of its Notice of Removal, defendant submitted a declaration  
26 that it employed 1,750 nonexempt employees in California during the proposed  
27 class period, and the average hourly rate of all nonexempt employees in California  
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1 is \$16.30. 7/20/22 Brice Decl. ¶¶ 3, 7. Based on this and various assumptions, in  
2 its Notice of Removal defendant asserted over \$22 million was in controversy on  
3 plaintiff's rest break claim alone.

4 In moving to remand, plaintiff argues defendant's assumptions are  
5 unreasonable and unsupported. Defendant opposes the motion with additional  
6 evidence and new assertions of the amount in controversy. In particular, defendant  
7 now asserts the aggregate amount in controversy is at least \$10,696,664.50,  
8 consisting of: \$2,398,452 for rest break claims; \$2,356,380 for waiting time  
9 penalties; \$3,837,200 for wage statement penalties; and \$2,104,632.50 for  
10 attorneys' fees. Opp. at 10-11. The court examines each in turn.

11 **A. Rest Break Claims**

12 Under the California Industrial Welfare Commission's wage orders,  
13 employees are entitled to a ten-minute rest period for each four hours of work, or  
14 major fraction thereof, but are not entitled to a rest period on any day they work  
15 less than three and one-half hours; and are generally entitled to a 30-minute meal  
16 period if they work more than five hours in a day. The California Labor Code  
17 requires that an employer "pay the employee one additional hour of pay at the  
18 employee's regular rate of compensation for each workday" a legally required meal  
19 or rest period is not provided. Cal. Lab. Code § 226.7(c). Defendant asserts  
20 \$2,398,452 is a reasonable estimate of the amount in controversy for plaintiff's rest  
21 break claims. Opp. at 3-6. Plaintiff argues defendant's estimate lacks sufficient  
22 evidentiary support. Mtn. at 5-9.

23 In support of its estimate, defendant offers another declaration of Ashley  
24 Brice, who oversees payroll at Metro Air Service Inc., and is familiar with its  
25 payroll database, timekeeping requirements policies and procedures, and the  
26 recordation of time. 9/6/22 Brice Decl. ¶¶ 1-2. She is also familiar and has access  
27 to the company's human resources management system, payroll system, and  
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1 employee timekeeping system. *Id.* Based on her analysis of the data, Brice states  
2 defendant employed 2100 non-exempt employees in California from May 5, 2018  
3 to the present (1805 of which are former employees), and 1777 non-exempt  
4 employees from May 5, 2019 to the present (1482 for which are former  
5 employees). *Id.* ¶ 7. Approximately 96% of these employees worked part-time,  
6 meaning 30 hours or less per week. *Id.* ¶ 8. She further states that “very few  
7 employees work less than four hours each shift,” and “[v]ery few, if any,  
8 employees work less than five days per week.” *Id.* Brice also sets forth the  
9 average hourly wages for non-exempt employees for each year of the proposed  
10 class period, ranging from \$13.02 to \$16.46. *Id.* ¶ 10.

11 Defendant calculates \$2,398,452 as the amount in controversy for the rest  
12 break claims by working from a three-year limitation period and then assuming all  
13 1777 putative class members worked five days a week, every week for over three  
14 years, at the highest average rate of pay during the class period, and had their right  
15 to a rest break violated on 10% of those days. In other words, 1777 class members  
16 x 164 weeks x 5 hours of premium pay per week x \$16.46 per hour x 10% =  
17 \$2,398,452.44. *Opp.* at 6. These assumptions are unsupported and flawed on  
18 multiple levels.

19 First, Brice declares that a total of 1777 employees worked since May 5,  
20 2019, not that that was the average number who worked in any given week. She  
21 does not say how many worked in any given week, but does say that 1482 of the  
22 1777 are former employees, which would seem to indicate that 295 are working  
23 there now. Whether it is fair to infer from this that 295 is a more reasonable  
24 estimate of the number working in any given week, the court cannot say. But  
25 whatever the average number of employees in a week, 1777 is plainly wrong, and  
26 likely by a long shot.

27 Second, since Brice also declares that 96% of the employees worked part-  
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1 time, there is no reason to assume all of these part-time employees worked five  
2 days a week. She does say “very few, if any” work less than five days a week, but  
3 “very few” is quite vague. “[T]he employer . . . has access to employment and  
4 payroll records that would allow it to provide more accurate figures.” *Nolan v.*  
5 *Kayo Oil Co.*, 2011 WL 2650973, at \*5 (N.D. Cal. July 6, 2011). Defendant did  
6 not bother to do so here.

7 Third, as set forth above, an employee needs to work at least three and one-  
8 half hours in a day to be entitled to any rest break. Brice declares that “very few”  
9 employees worked less than four hours each shift, but this again is vague. As such,  
10 the assumption that every employee worked not only five days a week, but five  
11 days in which the employee was entitled to a rest break, is unsupported and very  
12 likely incorrect, although how far off is impossible to determine on this record.

13 Fourth, the assumption that all of these employees are entitled to premium  
14 pay at the rate of \$16.46 per hour since May 2019 is also contrary to the evidence,  
15 since Brice declares that did not become the average rate of pay until 2022. For  
16 2019-21, the average ranged from \$13.02 to \$13.39.

17 Finally, defendant assumes it violated class members’ right to a rest break  
18 10% of the time – that is, one day every two weeks. Defendant provides no  
19 evidentiary support for this assumption. Since defendant “does not provide  
20 competent evidence, it must establish that its assumptions were ‘founded on the  
21 allegations of the complaint.’” *Waltz*, 2022 WL 489697, at \*2 (quoting *Arias v.*  
22 *Residence Inn by Marriott*, 936 F.3d 920, 927 (9th Cir. 2019)). Defendant claims  
23 plaintiff’s allegations of a “policy, practice, and procedure” of failing to provide  
24 meal and rest breaks justify its assumed 10% violation rate. Opp. at 4; see Compl.  
25 ¶¶ 12, 24, 29, 30, 33, 51, 91.

26 Allegations of “a ‘pattern and practice’ of doing something does not  
27 necessarily mean *always* doing something,” and therefore the removing party still  
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1 “bears the burden to show that its estimated amount in controversy relied on  
2 reasonable assumptions.” *Ibarra*, 775 F.3d at 1199. Defendant here cites “pattern  
3 and practice” cases in which courts have found assumed violation rates of between  
4 10% and 60% to be reasonable. *See, e.g., Zamora v. Penske Truck Leasing Co.,*  
5 *L.P.*, 2020 WL 4748460, at \*5 (C.D. Cal. Aug. 17, 2020) (“assumed violation rate  
6 of 10% is reasonable in light of Plaintiffs’ allegations that [defendant] engaged in a  
7 ‘policy and practice’ of various labor law violations”); *Chavez v. Pratt (Robert*  
8 *Mann Packaging), LLC*, 2019 WL 1501576, at \*3 (N.D. Cal. Apr. 5, 2019)  
9 (upholding 20% violation rate estimate where “complaint does not describe a  
10 specific rate of missed meal or rest period but alleges a ‘pattern or practice’ of such  
11 violations”). But in this case plaintiff does not in fact allege defendant had a  
12 pattern and practice of denying employees meal and rest breaks. Rather, plaintiff  
13 alleges defendant “did not have a policy and practice which provided timely off-  
14 duty meal and rest breaks to plaintiff.” Compl. ¶ 24; *see id.* ¶ 30. In other words,  
15 plaintiff alleges defendant failed to have a policy in place to assure employees  
16 received all their breaks and were compensated for those missed, but does not  
17 allege there was an affirmative policy, pattern, or practice of missed breaks.  
18 Plaintiff does allege a practice of failing to record those breaks that were missed  
19 (*id.* ¶ 29), but again, this suggests nothing about how often breaks were missed.  
20 Even so, this is not a case in which plaintiff utterly fails to allege anything about  
21 the frequency of the violations. In that regard, plaintiff alleges employees were  
22 required to work without their legally required breaks “from time to time.” *Id.*  
23 ¶¶ 12, 91, 95.

24 For defendant to assume a 10% violation rate based on allegations that there  
25 were violations from time to time is arbitrary. *See Sanders v. Old Dominion*  
26 *Freight Line, Inc.*, 2017 WL 5973566 at \*4 (S.D. Cal. Feb. 2, 2017) (“[W]ithout  
27 evidence to support this violation rate, the use of a 50% violation rate (or virtually  
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1 any violation rate for that matter) is completely arbitrary and little more than  
2 speculation and conjecture.”). Although a 10% assumption is conservative  
3 compared with 50% or 20%, it is still unsupported, and therefore does not meet  
4 defendant’s burden. *See Smith v. Diamond Resorts Mgmt., Inc.*, 2016 WL 356020,  
5 at \*3 (C.D. Cal. Jan. 29, 2016) (assumption of one meal period and one rest break  
6 violation per week unsupported by any evidence).

7 In any event, even if the 10% violation rate assumption were reasonable  
8 here, as set forth above, defendant has failed to put forth reasonable or supported  
9 assumptions regarding the number of employees who worked each week, how  
10 many days they worked each week during which they were entitled to a rest break,  
11 or the hourly rate. By comparison, in other cases the courts had more reliable  
12 information before them. *See, e.g., Ibarra*, 775 F.3d at 1198-99 (noting  
13 defendant’s declaration had “table listing all of its non-exempt employees and their  
14 corresponding number of shifts worked in excess of 5 hours and 3.5 hours,”  
15 although still finding assumption about violation rate “not grounded in real  
16 evidence”); *Zamora*, 2020 WL 4748460, at \*4 (noting assumptions “grounded in  
17 specific facts regarding the Plaintiffs’ work schedules and salaries,” and expert  
18 declaration “calculations took into account the frequencies at which employees  
19 earned the right to meal periods, rest breaks, and overtime pay, and in all cases  
20 ‘utilized each employee’s lowest hourly wage rate to determined the value’ of the  
21 claims”). Here, the court could correct the hourly rate assumptions, but has no  
22 basis to estimate how many days or shifts were worked with entitlement to a break.  
23 *See Harris*, 980 F.3d at 702 (where defendant offered no proof that all class  
24 members work sufficient shifts long enough to entitle them to meal and rest  
25 periods, defendant failed to carry its burden of proof regarding the amount in  
26 controversy).

27 In short, many of defendant’s assumptions made in support of its calculation  
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1 of the amount in controversy on plaintiff's meal and rest break claims are  
2 "unreasonable on [their] face without comparison to a better alternative." *See*  
3 *Jauregui v. Roadrunner Transp. Servs., Inc.*, 28 F.4th 989, 996 (9th Cir. 2022). As  
4 such, the court finds defendant has not met its burden and its asserted amount in  
5 controversy for these claims does not support its removal of this case.

6 **B. Waiting Time Penalties**

7 "Under California Labor Code § 203, an employer must pay daily wages for  
8 up to 30 days if it fails to pay all wages due within 72 hours of termination or  
9 resignation." *Chavez*, 2019 WL 1501576, at \*3. This penalty accrues daily until  
10 the wages are paid. *Id.* (citing Cal. Lab. Code § 203(a)).

11 Defendant argues that \$2,356,380 is a reasonable estimate of the amount in  
12 controversy for this claim. *Opp.* at 6. To reach this number, defendant started with  
13 the 1482 employees within the three-year statute of limitations who are now former  
14 employees (*see* 9/6/22 Brice Decl. ¶ 7(b)), and assumed a 100% violation rate.  
15 *Opp.* at 7. Defendant then multiplied the 1482 former employees by the amount of  
16 waiting time penalties due for 30 days' wages, at four hours per day, and at the  
17 supposed lowest hourly rate of \$13.25, to arrive at \$2,356,380 in controversy on  
18 this claim. *Id.* Plaintiff argues that waiting time penalties "are predicated on the  
19 previously pled violations" and because defendant did not provide "the total  
20 workweeks worked or total days worked in excess of four (4) hours," defendant  
21 failed to show that the 100% violation rate is proper. *Reply* at 10.

22 The main issue here is the reasonableness of assuming a 100% violation rate.  
23 The court finds it is reasonable. Plaintiff alleges the members of the class who  
24 were terminated and who had not been paid their full wages at the time of  
25 termination are entitled to waiting time penalties. *See* Compl. ¶ 113. A fair  
26 reading of the complaint is that it alleges all putative class members suffered at  
27 least some violation such that at the termination of their employment they all have  
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1 at least some unpaid wages. As defendant points out, plaintiff tied his waiting time  
2 penalties claim to defendant's alleged failure to pay a minimum wage, overtime  
3 wages, and provide the required rest breaks. Opp. at 7. It follows that "if every  
4 putative class member incurred damages for at least one other claim in the  
5 complaint, every class member who departed [employment] during the statutory  
6 period was due unpaid wages," and thus entitled to 30 days of waiting time  
7 penalties. *Chavez*, 2019 WL 1501576, at \*4.

8 Nonetheless, the amount in controversy is not quite reasonably estimated at  
9 \$2,356,380. First, this is based on a supposed lowest hourly rate of \$13.25, but  
10 that was plaintiff's hourly rate, not the lowest hourly rate of the putative class. *See*  
11 9/6/22 Brice Decl. ¶ 12. The lowest average hourly rate during the class period  
12 was \$13.02 (*id.* ¶ 10), and therefore that is the rate that should be used in the  
13 calculation.

14 Second, defendant assumes these former employees had four-hour  
15 workdays, but the basis for that assumption is shaky. As set forth above, Ms. Brice  
16 declares that 96% of employees worked part-time, and "very few" worked less than  
17 four hours each shift (*id.* ¶ 8); but again, "very few" is vague. Based on this vague  
18 assertion, the multiplier in determining waiting time penalties should be something  
19 less than four hours, but the court is hard pressed on this record to say what that  
20 number should be. "The district court should weigh the reasonableness of the  
21 removing party's assumptions, not supply further assumptions of its own." *Harris*,  
22 980 F.3d at 701. On the other hand, where "the *reason* a defendant's assumption is  
23 rejected is because a different, better assumption is identified," then "the district  
24 court should consider the claim under the better assumption – not just zero-out the  
25 claim." *Jauregui*, 28 F.4th at 996.

26 The better assumption than four hours has not been identified here. But a  
27 fair, if generous, reading of Brice's declaration may support a reasonable  
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1 assumption of a three-hour workday. Thus, multiplying 1482 former employees by  
2 30 days by three hours by \$13.02, the amount in controversy for plaintiff's waiting  
3 time penalties claim would be \$1,736,607.60.

4 **C. Wage Statement Penalties**

5 California Labor Code § 226(a) requires that an employer furnish employees  
6 with an "accurate itemized statement" reflecting, among other things, all gross and  
7 net wages earned, total hours worked, and applicable hourly rates in effect during  
8 the pay period. "[A]n employer owes a penalty of \$50 per initial pay period and  
9 \$100 for each subsequent pay period when it fails to provide complete and accurate  
10 wage statements to employees, with an aggregate cap of \$4,000 per employee."  
11 *Chavez*, 2019 WL 1501576, at \*3. Plaintiff alleges that "from time to time"  
12 defendant failed to furnish accurate, itemized wage statements showing all  
13 applicable hourly rates, all overtime hourly rates, and all gross and net wages  
14 earned. Compl. ¶ 100.

15 Defendant estimates that the penalties for issuing non-compliant wage  
16 statements amount to \$3,837,200. Opp. at 7. Defendant supports this figure by  
17 multiplying 1448 (the number of employees in a one-year limitations period  
18 (9/6/22 Brice Decl. ¶ 7(c))) by 26 pay periods and by the \$100 penalty for each  
19 inaccurate workweek. Opp. at 7-8. Defendant then adds to this figure the  
20 calculation of the initial pay period penalty, 1448 employees times \$50. *Id.*  
21 Defendant claims its 100% violation rate assumption is reasonable because  
22 plaintiff made "broad allegations that Defendant systematically failed to pay  
23 putative Class Members proper overtime wages, meal period premiums, and rest  
24 break premiums." Opp. at 8 (citing Compl. ¶¶ 100 - 101).

25 Defendant has again failed to meet its burden here, for two reasons. First,  
26 and most basically, defendant apparently assumes two-week pay periods, and  
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1 therefore 26 wage statements over the course of a year.<sup>1</sup> But there is absolutely no  
2 evidence in the record as to how long defendant's pay periods were, or how many  
3 wage statements were issued to the 1448 employees. Neither of the Brice  
4 declarations touches on this, although this information should be readily in  
5 defendant's possession. *See* 9/6/22 Brice Decl. ¶ 4. Without any basis for  
6 determining the number of statements at issue, it is impossible to calculate the  
7 amount of wage statement penalties in controversy.

8 Second, defendant's assumption of a 100% violation rate is unsupported.  
9 Unlike waiting time penalties, which are effectively triggered when there is a  
10 single violation at any time for any employee, wage statement penalties only apply  
11 if there is a pay or recording violation (resulting in an inaccurate wage statement)  
12 for each statement in question. Defendant argues it is reasonable here to assume at  
13 least one violation for each employee for each pay period given the allegations in  
14 this case. Courts have upheld such assumptions where complaints alleged a  
15 consistent policy or uniform practice of violations. *See Lucas v. Michael Kors*  
16 *(USA), Inc.*, 2018 WL 2146403, at \*9 (C.D. Cal. May 9, 2018) (where plaintiff  
17 alleged "consistent policy" of failing to provide breaks then wage statements  
18 "would necessarily have been inaccurate 100% of the time"); *Moppin v. Los*  
19 *Robles Reg'l Med. Ctr.*, 2015 WL 5618872, at \*3 (C.D. Cal. Sep. 24, 2015)  
20 (upholding 100% violation assumption where complaint alleged defendants  
21 "uniformly and systematically" failed to furnish accurate wage statements "[a]t all  
22 times"). By contrast, here plaintiff alleges defendant failed to provide employees  
23 with accurate wage statements "from time to time." Compl. ¶ 100. This does not  
24 support a 100% violation rate.

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27 <sup>1</sup> If this is so, then it seems defendant should have found one \$50 penalty plus  
28 \$100 penalties for each employee over the course of the year rather than 26  
\$100 penalties.

1 Accordingly, for two separate reasons, there is no basis in the record to  
2 determine how many wage statements may be at issue, leaving no basis to consider  
3 an alternative potential amount in controversy. *See Jauregui*, 28 F.4th at 996;  
4 *Harris*, 980 F.3d at 701. Defendant has not met its burden, and therefore its  
5 asserted amount in controversy for this claim does not support its removal of this  
6 case.

7 **D. Attorneys' Fees**

8 Defendant also includes attorneys' fees in its calculation of the amount in  
9 controversy. *See Fritsch*, 899 F.3d at 794 ("a court must include future attorneys'  
10 fees recoverable by statute or contract when assessing whether the amount-in-  
11 controversy requirement is met"). Defendant calculates that plaintiff's claims  
12 implicate \$2,104,632.50 in attorneys' fees, using a benchmark of 25% of projected  
13 damages for the meal and rest break, waiting time, and wage statement penalties.  
14 *Opp.* at 9. But although using a 25% benchmark has been found reasonable in  
15 some cases, the Ninth Circuit has explicitly "reject[ed] [the] argument that [it]  
16 should hold that, as a matter of law, the amount of attorneys' fees in controversy in  
17 class actions is 25% of all other alleged recovery." *Fritsch*, 899 F.3d at 796.  
18 Rather, "the defendant must prove the amount of attorneys' fees at stake by a  
19 preponderance of the evidence," with such calculation taking into account the  
20 applicability of any contractual or statutory requirements, such as whether the  
21 lodestar method applies. *Id.*

22 By simply assuming a 25% benchmark here, defendant has not met its  
23 burden with respect to the calculation of attorneys' fees at issue. Moreover, even if  
24 the court were to accept the 25% benchmark, as set forth above, the only amount in  
25 controversy defendant has met its burden to demonstrate on any claim is  
26 \$1,736,607.60 for waiting time penalties. Adding 25% to that for attorneys' fees  
27 would result in a total of only \$2,170,759.50 in controversy here, well below the  
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1 \$5 million required for removal.

2 For these reasons, defendant has failed to prove, by a preponderance of the  
3 evidence, that the amount in controversy exceeds the \$5 million CAFA threshold  
4 for removal.

5 **IV.**

6 **CONCLUSION**

7 IT IS THEREFORE ORDERED that plaintiff's motion to remand (docket  
8 no. 24) is granted. The Court Clerk is directed to remand this action to the  
9 Superior Court of the State of California for the County of Los Angeles.

10  
11  
12 DATED: February 7, 2023



13 SHERI PYM  
United States Magistrate Judge